In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-814

DELTA AIR LINES, INC., PETITIONER

v.

ROSEMARY AUGUST

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

QUESTIONS PRESENTED

1. Whether Rule 68 of the Federal Rules of Civil Procedure mandates assessment of costs against a plaintiff in a Title VII case in which (a) the defendant's offer of judgment, rejected by the offeree, placed an arbitrary limit on the amount the court could award as accrued costs including attorneys' fees, (b) the offeree did not "finally obtain" a judgment against which the offer could be compared, and (c) the offer was not a reasonable one with a chance of inducing settlement.

2. Whether the district court abused its discretion under Rule 54(d) by ordering both parties to bear their own costs.

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The opinion of the court of appeals (J.A. A2-A7)[1] is reported at 600 F.2d 699. A companion opinion (J.A. A15-A18) and the opinions of the district court (J.A. A8-A13, A19-A32) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 1979. A petition for rehearing was denied August 28, 1979 (J.A. A1). The petition for a writ of certiorari was filed on November 23, 1979, and was granted on April 21, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULES AND STATUTE INVOLVED

Rule 1, Fed.R.Civ.P., provides:

> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action.

Rule 54(d), Fed.R.Civ.P., provides:

> Except when express provision therefore is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs; but costs against the United States, its officers, and agencies shall be imposed only to the extent permitted by law. Costs may be taxed by the clerk on one day's notice. On motion served within

[1] "J.A." refers to the joint appendix to the briefs.

5 days thereafter, the action of the clerk may be reviewed by the court.

Rule 68, Fed.R.Civ.P., provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

Section 706(k), Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT OF INTEREST

Many federal statutes such as the one involved in this litigation, Title VII, Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, depend on private litigants, playing the role of "private attorneys-general," for their effective enforcement. See, *e.g.*, *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 45 (1974). The United States and the Equal Employment Opportunity Commission (which administers federal fair employment statutes, including Title VII) believe that petitioner's arguments, if accepted, could lead to misuse of the Federal Rules of Civil Procedure and undermine enforcement of such federal statutes. This is so because claimants under Title VII and similar statutes who have nonfrivolous claims might be deterred from pursuing those claims in the courts if a token offer, made early in the litigation by a defendant and reasonably rejected by a plaintiff, were considered sufficient to mandate the assessment of the defendant's post-offer costs against a plaintiff who ultimately failed to recover on his or her claim. Under Rule 54(d), which would govern if Rule 68 did not apply, such a claimant would at least be assured that in such circumstances the district court could exercise its discretion to direct that each party bear its own costs if this were the more just result. A construction of Rule 68 that would encourage token offers and, accordingly, discourage offers that might reasonably induce settlement, would also undermine the congressional policy of encouraging voluntary resolutions of Title VII disputes.

STATEMENT

Following a determination by the EEOC that there was reasonable cause to believe that petitioner Delta Airlines, Inc., discharged respondent Rosemary August because of her race, respondent brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, asking for reinstatement, backpay, and attorneys' fees (J.A. A2-A3, A15, A19).[2]

On May 12, 1977, petitioner submitted the following offer of judgment to respondent's counsel (J.A. A34):

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450, which shall include attorneys' fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable in this action, or that the plaintiff has suffered any damage.

The offer was not accepted. The docket sheets reveal that in addition to filing a complaint, respondent's counsel had, by May 12, 1977, participated in this action by attending respondent's deposition, preparing a set of interrogatories, and being present at a status call.[3]

[2]The complaint also sought damages under a pendent state claim for defamation (J.A. A19). Summary judgment was entered for petitioner on that claim without opposition by respondent (J.A. A20).

[3]We have been informed by respondent's counsel that she had spent 39 hours on this case by May 12, 1977, and that her billing rate is $50 per hour. At the time of petitioner's offer, therefore, respondent's attorneys' fees could have been as much as $1,950.

The matter proceeded to trial. At the close of respondent's case, petitioner moved for dismissal under Fed. R. Civ. P. 41(b). The district court denied the motion at the close of the trial but entered judgment against respondent (J.A. A32). The court found that respondent had demonstrated that in a number of instances "stern measures were taken against Negroes in general and [respondent] Rosemary August in particular, while a more tolerant attitude was displayed toward Caucasians" and that "the benefit of any doubt was shown a Caucasian flight attendant but not a Negro." Nevertheless, the court found that petitioner had demonstrated that "in equal numbers of cases, it was the Negro that benefited * * *" (J.A. A31). The court concluded (J.A. A32) that although "[f]rom the evidence presented, it would appear that Delta Air Lines, Inc. may not be the most pleasant place to work[,]" the record "does not establish that its employment practices are racially premised" or that respondent had been subject to disparate treatment because she was black.

In entering judgment for petitioner, the district court, without elaboration, ordered each side to "bear its own costs of litigation" (*ibid.*).

Ten days after entry of judgment, petitioner served a motion for reassessment of costs under Rule 68. The district court denied the motion. At the hearing on the motion, the court explained (J.A. All):

> [A] Rule 68 offer must be made in a good faith attempt to settle the parties' litigation and, thus, must be at least arguably reasonable.
>
> * * * * *
>
> If the purpose of the rule is to encourage settlement, it is impossible for this Court to concede

> that this purpose can be furthered or aided by an offer that is not at least arguably reasonable.

The court found the $450 offer not to be arguably reasonable (J.A. A12):

> At the time this offer of $450 was made this litigation was approximately four months old. While the offer was intended to be received in full settlement of the parties' dispute, it is unlikely that such a small sum of money would even have fully satisfied the plaintiff's then incurred costs in attorneys' fees.

The court noted (*ibid.*) that it had not found the claim to have been frivolous.

The court of appeals affirmed the judgment. As to the merits of the action, the court of appeals held that the judgment was not clearly erroneous and had been supported by substantial evidence (J.A. A15–A18). In a separate opinion concerning the district court's denial of costs under Rule 68, the court of appeals rejected a "technical" reading of that rule under which a trial court would be required to impose costs on a nonprevailing plaintiff even when the rejected offer had been clearly unreasonable. The court observed (J.A. A5) that such a construction of the rule would undermine its purpose of encouraging settlements, since "a minimal Rule 68 offer made in bad faith could become a routine practice of defendants seeking cheap insurance against costs." The court further explained (J.A. A6) that in its application to Title VII cases, such a construction of the rule would work against the congressional policy of encouraging "aggrieved individuals to seek redress for violations of their civil rights." Accordingly, without deciding whether its interpretation of the rule should apply "in other kinds of cases," the court held (*id.* at A7):

> In Title VII cases, the trial judge may exercise his discretion and allow costs under Rule 68 when, viewed as of the time of the offer along with consideration of the final outcome of the case, the offer can be seen to have been made in good faith and to have had some reasonable relationship in amount to the issues, litigation risks, and expenses anticipated and involved in the case.

SUMMARY OF ARGUMENT

1. In cases to which it applies, Rule 68 of the Federal Rules of Civil Procedure mandates the assessment of post-offer costs against an offeree who has rejected an offer of judgment. But Rule 68 does not apply (1) where the offer arbitrarily limits the amount of "costs then accrued" to be paid by the offeror, (2) where the offeree does not "finally obtain[]" a judgment, and (3) where the offer is a mere token with no likelihood of inducing a settlement. These three independent grounds supporting the judgment below have special force in Title VII suits.

a. The plain language of Rule 68 requires that an offer include "costs then accrued." In Title VII cases in which a plaintiff obtains relief, whether through litigation or through settlement, the plaintiff's costs ordinarily include attorney's fees. *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978). Petitioner's offer of "$450 which shall include attorney's fees, together with costs accrued to date" would not permit entry of a judgment allowing taxation of all accrued costs deemed proper by the court. No such limitation is provided for in the rule, and the rule therefore may not be invoked to mandate an assessment of post-offer costs against respondent here.

b. The plain language of Rule 68 also makes it applicable only in cases in which a "judgment finally obtained by the offeree is not more favorable than the offer." The underlying assumption—that the rule applies only in cases in which the offeree obtains some relief—reflects the operation of state offer-of-judgment provisions from which Rule 68 was derived. Other provisions of state codes mandated an assessment of costs in favor of the prevailing party in many actions, including most suits at law. The offer-of-judgment provisions made it possible for courts to deny costs to a prevailing plaintiff who had rejected a reasonable offer of judgment and thereby needlessly prolonged the litigation. The same result was achieved in actions in equity through the courts' exercise of discretion over cost awards.

c. The language of opinions in state cases applying state offer-of-judgment provisions and in federal cases applying Rule 68 reflects an assumption that only reasonable offers—those that might induce a reasonable offeree under the circumstances to settle the case—properly trigger cost-shifting provisions. A construction of Rule 68 that permits a token offer to trigger a shifting of costs in the event the offeree rejects it and ultimately recovers less would undermine the recognized purpose of Rule 68 "to induce settlement" and thereby "avoid protracted litigation." Defendants would be encouraged, instead, to make a nominal offer at the earliest stage of the litigation, gambling on the chance that the plaintiff would recover nothing and that the court would then be deprived of its discretion under Rule 54(d) not to award costs against the nonprevailing plaintiff where justice in the particular circumstances of the case dictates some other result.

Where a nonprevailing plaintiff is shown to have rejected a reasonable settlement offer, however, it might well be an abuse of the court's discretion under Rule 54(d) to direct that the prevailing defendant not recover its costs. Indeed, since a prevailing party may recover all of its costs under Rule 54(d)—not just post-offer costs as under Rule 68—a more just result can be obtained under Rule 54(d) in cases in which the offeree obtains no judgment.

d. The construction of Rule 68 of the Federal Rules of Civil Procedure that we urge is the one most consistent with the rule's purposes and with other relevant provisions: Rule 1, which requires that the rules be construed in the way most likely to achieve a "just, speedy, and inexpensive determination of every action"; Rule 54(d), which combines traditional rules for cost assessment in suits at law and actions in equity in a manner that the drafters thought would guarantee the best results; and Title VII of the Civil Rights Act of 1964, which depends on private attorneys general for its enforcement and thus would be undermined by any construction of judicial rules that would threaten large cost awards against plaintiffs with nonfrivolous but unsuccessful claims, even where, in the circumstances of the case, such awards are unwarranted.

2. Because Rule 68 was held inapplicable in this case, costs were determined under Rule 54(d). The trial court, which was in the best position to weigh the equities of the case, properly exercised its discretion in directing that each party bear its own costs. Its order was proper because respondent's claim was not frivolous, she had rejected no reasonable settlement offer, she is an unemployed airline stewardess for whom even her own costs of litigation represent a con-

siderable burden, and petitioner is clearly able to absorb its own costs.

ARGUMENT

I. RULE 68 OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT MANDATE ASSESSMENT OF COSTS AGAINST A TITLE VII PLAINTIFF WHERE THE DEFENDANT'S OFFER OF JUDGMENT HAS PLACED AN ARBITRARY LIMIT ON THE AMOUNT THE COURT MAY AWARD AS ACCRUED COSTS, INCLUDING ATTORNEYS' FEES, THE OFFEREE HAS NOT OBTAINED A JUDGMENT WITH WHICH THE OFFER MAY BE COMPARED, AND THE OFFER IS NOT A REASONABLE ONE WITH A CHANCE OF INDUCING SETTLEMENT

The ruling of the courts below that Rule 68 does not mandate the assessment of costs against the respondent in this case is supported by three grounds, each an independent basis for the judgment. Although independent, all three grounds relate to the basic purposes of the rule: "to encourage settlements" and thereby "avoid protracted litigation" (*Advisory Committee Report on Proposed Amendments to the Rules of Civil Procedure*, 5 F.R.D. 433, 483 (1946))[4] and "to protect the party who is willing to settle from the bur-

[4] Although this statement of purpose was not included in the notes on the rule as promulgated in 1938, it has been repeatedly cited by courts and commentators. See, *e.g.*, 7 *Moore's Federal Practice* ¶ 68.02 at 68-4 (1979); 12 C. Wright & A. Miller, *Federal Practice and Procedure* § 3001 at 56 (1973); *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30*, 86 F.R.D. 500, 502, 22 Fair Empl. Prac. Cas. 1249, 1250 (N.D. Cal. 1980); *Mr. Hanger, Inc.* v. *Cut Rate Plastic Hangers, Inc.*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974); *Maguire* v. *Federal Crop Insurance Corp.*, 9 F.R.D. 240, 242 (W.D. La. 1949).

The Advisory Committee Note to Rule 68 as first promulgated, gave no explanation for the rule. It stated in full: "See 2

den of costs which subsequently accrue." *Staffend* v. *Lake Central Airlines, Inc.*, 47 F.R.D. 218, 219 (N.D. Ohio 1969).

First, the judgment was proper because the offer did not include all costs accrued at the time it was made and therefore did not comply with the express terms of Rule 68. Second, the language, the history, and the purpose of the rule indicate that it applies only in cases—unlike this one—in which a plaintiff or other claimant party has recovered a judgment granting some relief but the relief obtained is less favorable than that offered by the defending party. Third, the history and purpose of the rule suggest that a token offer that could not have induced any reasonable person to settle the case at that phase of the suit does not come within the rule. Although these arguments have potentially broader application, we believe they have special force in Title VII suits.

We do not disagree with petitioner's contention (Pet. Br. 10-11) that Rule 68 is "mandatory" with respect to the assessment of costs, *i.e.*, that costs "must" be assessed against an offeree who has rejected an offer to which the rule applies and who has "finally obtained" a judgment less favorable than the offer. We argue only that in this case Rule 68 does not apply.

A. The Offer Did Not Include All Accrued Costs and Thus Did Not Comply with the Rule

A valid Rule 68 offer necessarily consists of two components: (1) relief, in the sense of "money or property" or terms having some specified "effect" on the

Minn. Stat. (Mason, 1927) § 9323; 4 Mont.Rev.Codes Ann. (1935) § 9770; NY CPA (1937) § 177." 7 *Moore's Federal Practice* ¶ 68.01[2] (3d ed. 1979). See discussion, *infra*, pages 16-18).

matter in controversy, and (2) taxable "costs then accrued." While the rule permits the offeror to determine the nature of the relief offered (on the implicit conditions explained *infra*, pages 15–26), it permits him no flexibility as to costs. If the offer is accepted, the offeror must pay whatever costs the court determines were taxable at the time the offer was extended. "Rule 68 does not permit an offeror to choose which accrued costs he is willing to pay." *Scheriff* v. *Beck*, 452 F. Supp. 1254, 1260 (D. Colo. 1978). An offer that either omits costs or that sets a limit on the amount of costs the district court may determine clearly does not comply with the rule. *Ibid.*; *Johnny Carson Apparel, Inc.* v. *Zeeman Mfg. Co.*, 203 U.S.P.Q. (BNA) 585, 596 (N.D.Ga. 1978). See also *Conolly* v. *S.S. Karina II*, 302 F. Supp. 675, 683 (E.D.N.Y. 1969). Thus, offers for "$450 together with half the costs then accrued," for "$450, which shall include expenses for trial transcripts, together with costs then accrued," or simply for "$450" would not satisfy the terms of the rule.

The requirement that the offer contain an unequivocal agreement to reimburse all "costs then accrued," as subsequently determined by the court, is both stated in the rule's plain language and consistent with the rule's purpose "to encourage settlement." Without mandatory reimbursement of accrued costs, the offeree will have little incentive to settle, especially if costs are substantial or they encroach on the relief offered. By forcing the offeror to agree to pay whatever costs will be taxed by the court, the requirement also discourages, although it does not prevent, sham offers made solely to invoke the cost-shifting provision of the rule and not to settle disputes.

Neither Rule 68 nor Rule 54(d), the general cost assessment provision, provides a definition of costs. Hence resort to relevant statutory provisions is necessary in order to determine what items are included. It follows that when the action is one based on a statute that requires a court to award attorneys' fees as part of costs, an offer fails to comply with Rule 68 if it offers to pay less than all "costs then accrued," including whatever a court subsequently determines to be reasonable attorneys' fees. See *Scheriff* v. *Beck*, *supra*, 452 F. Supp. at 1260 (in civil rights action, offer of "$10.00 inclusive of costs, interest, and attorneys' fees" was "fatally defective because it excludes attorney's fees then accrued"). See also *Perkins* v. *New Orleans Athletic Club*, 429 F. Supp. 661, 667 (E.D. La. 1976).[5]

Under the attorneys' fees provision of Title VII of the Civil Rights Act of 1964, Section 706(k), 42 U.S.C. 2000e-5(k), such fees are awarded "as part of the costs."[6] Moreover, the award of fees to prevailing plaintiffs is virtually mandatory: "a prevailing Title

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[5] As a corollary to the inclusion of attorneys' fees as a mandatory component of costs, the offeree who rejects an offer that conforms to Rule 68 requirements risks not recovering attorneys' fees, because the judgment may be less favorable than the offer and the offeree will thereby forfeit any right to costs, including attorneys' fees, that he or she would otherwise enjoy as the prevailing party. See *Waters* v. *Heublein, Inc.*, 485 F. Supp. 110 (N.D. Cal. 1979).

[6] In *Roadway Express Inc.* v. *Piper*, No. 79-701 (June 23, 1980), the Court held that "costs," as that term is used in 28 U.S.C. 1927, do not encompass the attorneys' fees referred to in Section 706(k). That holding is inapposite here. Crucial to the Court's interpretation of Section 1927 was that Section's common ancestry with 28 U.S.C. 1920 and 1923. Slip op. 7. The Court stressed that incorporating Section 706(k) in Section 1927 would force abandonment of the "uniform approach" intended by

VII *plaintiff* ordinarily is to be awarded attorney's fees in all but special circumstances." *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 417 (1978) (emphasis in original; footnote omitted); *New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980), slip op. 8). A prevailing plaintiff is one who obtains relief, including relief by settlement. See *Maher* v. *Gagne*, No. 78-1888, (June 25, 1980), slip op. 7 (under the Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. 1988,[7] "[t]he fact that respondent prevailed through a settlement rather than through litigation does not weaken her claim to fees"). Acceptance of a valid Rule 68 offer, moreover, means that the court must enter judgment against the offeror ("the clerk shall enter judgment"). In Title VII cases, therefore, valid Rule 68 offers can impose no limits on the amount of attorneys' fees that the offeree may recover as part of costs then accrued.[8]

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the legislation which spawned Section 1927. Slip op. 8. By contrast, Rules 54(d) and 68 do not presuppose uniformity but absorb definitions of costs as they appear in the substantive statutes involved in the litigation. Equally crucial to the Court's decision in *Roadway Express* was the difference in the functions served by Section 1927 and Section 706(k). Section 1927 is "concerned only with limiting the abuse of court processes." Slip op. 9. Section 706(k) is concerned with reimbursing a successful plaintiff when he prevails on the merits of the action. The taxation of costs under Rules 54(d) and 68 similarly relates directly to judgments on a party's claim.

[7] 42 U.S.C. 1988 and 42 U.S.C. 2000e-5(k) "may be considered to have the same substantive content * * *. They authorize fee awards in identical language, and Congress acknowledged the close connection between the two statutes when it approved § 1988." *Roadway Express, Inc.* v. *Piper*, *supra*, slip op. 5 n.5.

[8] Two decisions that hold that attorneys' fees are not part of costs, *Cruz* v. *Pacific American Ins. Co.*, 337 F.2d 746 (9th Cir. 1964), and *Gamlen Chemical Corp.* v. *Dacor Chemical Products Co.*, 5 F.R.D. 215 (W.D. Pa. 1946), if correctly decided, are distinguishable. Neither was a civil rights action. Unlike here, the substantive statutes in both cases give courts broad discretion in awarding attorneys' fees. The courts therefore held that attorneys' fees had not "accrued" when the offers were made.

Petitioner's offer, which placed a limit of $450 on respondent's total recovery, including attorneys' fees, did not offer to reimburse respondent for all costs then accrued. In fact, it appears that her accrued costs, including attorneys' fees, substantially exceeded the amount of the offer (see note 3, *supra*); but even had that not been the case, the offer would remain defective under Rule 68 because the offer's express terms purported to limit the authority of the district court, following a timely acceptance by respondent, to tax in full the costs accrued at the time the offer was made.[9]

B. The Rule Does Not Apply in This Case Because the Offer Was Not a Reasonable Settlement Offer and No Judgment Was "Finally Obtained by the Offeree"

According to its plain language, Rule 68 applies only in those cases in which a "judgment [is] finally obtained by an offeree" and it is "not more favorable than the offer." See Note, *Rule 68: A "New" Tool for Litigation*, 1978 Duke L.J. 889, 895. As we show below, the history of the rule is consistent with this reading.

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[9] Although we have argued that attorneys' fees must be included as costs in any valid Rule 68 offer, we do not mean to suggest that the Title VII defendant who makes a valid Rule 68 offer is entitled to attorneys' fees as part of costs if the plaintiff recovers less than the offer. Under Title VII, defendants are not entitled to attorneys' fees "unless a court finds that [the plaintiff's] claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 422. That condition of the applicable substantive statute properly governs an award of costs to a Title VII defendant under Rule 68.

That same history also makes it clear that the rule was necessarily promulgated with the understanding that it applied only to reasonable offers designed to settle cases and not to token offers aimed only at ensuring that all costs will be absorbed by the plaintiff in the event the defendant-offeror prevails on the merits. The two points are related, and we therefore discuss them together, even though the judgment in this case could be sustained on either ground.

As we show below, the rule as we believe it should be construed also operates in a way that best serves the purposes of this and other federal rules. If an offeree fails to obtain any judgment, costs are determined under Rule 54(d) where, as the prevailing party, the offeror will ordinarily recover not only his post-offer costs, but his costs for the entire litigation. Only where the court determines that justice requires some other result will the offeror not recover his costs, and a showing that the plaintiff had refused a reasonable offer would be a powerful restraining influence on a court's exercise of discretion to direct any cost allocation other than an award to the prevailing party.

1. *The Origins of Rule 68 Support Our Interpretation*

By limiting its annotation of Rule 68 to a citation of three state statutes (see page 10, note 4, *supra*), the advisory committee responsible for the original Federal Rules of Civil Procedure indicated that the purpose and effect of Rule 68 were to be evaluated in the light of existing state law, and of the cited statutes from Minnesota, Montana, and New York in particular.

Like the original rule, all three statutes describe the event triggering costs as the offeree's failure to obtain

(or recover) a judgment more favorable than the offer—language that would permit application of the provisions to cases in which a plaintiff-offeree recovered no judgment at all. 2 Minn. Stat. § 9323 (Mason 1927); 4 Mont. Rev. Code Ann. § 9770 (1935); J. Cahill & A. Griffin, *New York Civil Practice*, N.Y.C.P.A. § 177 (7th ed. 1937). But an examination of other provisions governing costs in those state codes reveals that costs were awarded as a matter of course to a prevailing party in most suits at law. See 2 Minn. Stat. §§ 9471-9473 (Mason 1927); 4 Mont. Rev. Code Ann. §§ 9787-9788 (1935); J. Cahill & A. Griffin, *New York Civil Practice*, *supra*, at §§ 1470-1475. In such cases there was thus no reason for a prevailing defendant to rely on a rejected offer of judgment (or "compromise" in the language of the Minnesota and New York statutes) in order to recover his costs and therefore no reason for the provisions to apply where the plaintiff recovered no judgment;[10] but these provisions did serve the important function of preventing a prevailing plaintiff from recovering his costs as a matter of course where he had rejected a reasonable offer and continued the litigation without good reason. See *Hochreich* v. *Amalgamated Laundries Inc.*, 240 N.Y.S. 11, 14, 136 Misc. 507, 510 (1930), cited in 3 *Moore's Federal Practice* 3364 (1st ed. 1938) (effect of a plaintiff's rejection of an offer of judgment "is to deprive [him] of his right to costs").

The offer of judgment provisions thus provided for most suits at law the benefits of a principle analogous to one commonly applied in actions in equity, in which

[10] We note that in every case cited by petitioner as illustrating the proper construction of state provisions similar to Rule 68 (Pet. Br. 8 n.5), the plaintiff had recovered a judgment.

costs were in the discretion of the court,[11] *i.e.*, that costs should be denied to a prevailing plaintiff where it is shown that he has "received a *bona fide* offer of a proper settlement before bringing suit, but * * * brings suit more or less vexatiously." *McCloskey* v. *Bowden*, 82 N.J. Eq. 410, 412 (1914).[12]

That cost provisions governing offers of judgment contemplate only reasonable offers with a chance of inducing settlement is indicated by the reference to "compromise" in the titles of statutes such as those of New York and Montana; and this assumption is also suggested in the case law. Moreover, the assumption underlies both state decisions that view offer-of-judgment statutes as deriving from the common law practice of permitting deposits in court of monies that

[11] See, *e.g.*, *Newton* v. *Consolidated Gas Co.*, 265 U.S. 78 (1924); *Wade* v. *Cox*, 115 N.J. Eq. 608, 172 A. 215 (1934); *Nolan* v. *Lantz Sanitary Laundry Co.*, 85 Colo. 247, 249, 274 P. 931, 932 (1929). This was not the case in all of the states, however. See, *e.g.*, Carroll's Ky. Rev. Stat. Ann. § 889 (Baldwin 1936) (providing for awards of costs to prevailing parties in actions in equity as well as in "ordinary" suits). In New York, statutes controlled cost awards in those equitable actions in which the plaintiff sought only a money judgment. J. Cahill & A. Griffin, *New York Civil Practice*, N.Y.C.P.A. §§ 1470(11), 1475, (7th ed. 1937).

[12] In holding that the precursor of the New York provision cited in the Advisory Committee Note to the 1938 rules did not apply in equitable actions, in which courts could, through the exercise of discretion, avoid injustice with respect to costs, a New York court observed that the rule was meant to apply only "to those cases where costs were allowed [as a matter of course]." *Conolly* v. *Hyams*, 58 N.Y.S. 932, 933 (1899). And see *Margulis* v. *Solomon & Berck Co., Inc.*, 223 A.D. 634 (N.Y. 1928), an action in which the plaintiff sought both damages at law and equitable relief. The court assumed that Section 177 of the New York Civil Practice Act might apply in the case but found "not permissible under our practice" defendant's offer of judgment for equitable relief only, remitting the plaintiff to his action at law for damages. 223 A.D. at 635.

a defendant admits are owing (see *Kaw Valley Fair Ass'n* v. *Miller*, 42 Kan. 20, 21, 21 P. 794, 795 (1889); Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law [hereafter "LCCR Br."] at 7) and those that regard them as statutory creations serving a somewhat different function. See *Wordin* v. *Bemis*, 33 Conn. 216, 217-218 (1866).

Thus, although the court in *Wordin* v. *Bemis*, *supra*, observed that the "conditions and effect" of the Connecticut offer of judgment statute were different from those of common law tenders, it cited as a purpose of the statute "the enabling of a party to buy his peace" (33 Conn. at 218), something that clearly could not be done by a token offer that implicitly denied any liability or did not amount to a true compromise. In *Herring-Hall-Marvin Safe Co.* v. *Letson Balliet*, 44 Nev. 94, 96, 190 P. 76-77 (1920), the court found valid under the Nevada statute an offer made as to one of plaintiff's two claims, but made it clear that this offer represented an acknowledgement that something was due the plaintiff ("the defendant may remove from the controversy the undisputed claim by the offer of judgment").[13] In a symposium on the new federal rules held shortly after they were issued in 1938, a member of the Advisory Committee echoed this conception of an offer when he explained Rule 68 as a rule "based upon statutes which are widely prevalent in the states," that "affords a means for stopping the running of costs where the defendant admits that part of the claim is good but proposes to contest the balance."

[13] The defendant-offeror recovered his costs only because plaintiff's total recovery amounted to less than the offer on the single claim. *Ibid.* The offer was not required to include costs because the Nevada statute did not mandate inclusion of costs accrued. *Ibid.*

American Bar Ass'n, *Rules of Civil Procedure for the District Courts of the United States with Notes as prepared under the direction of the Advisory Committee and Proceedings of the Institute on Federal Rules, Cleveland, Ohio* 337 (1938).

State courts have also expressed the understanding that an offer of judgment must amount to a genuine proposal to compromise by expressly describing the offers contemplated by the statute in question as "fair" or "reasonable," and they have linked this idea to a statutory purpose of encouraging the settlement of litigation. See, *e.g.*, *Brown* v. *Nolan*, 98 Cal. App. 3d 447, 449, 159 Cal. Rptr. 469, 470 (1st Dist. Ct. 1979) (purpose of statute "is to encourage the settlement of litigation without trial" and effect "is to punish the plaintiff who fails to accept a reasonable offer from a defendant"); *Benda* v. *Fana*, 10 Ohio St. 2d 259, 262, 227 N.E.2d 197, 200 (purpose of statute is "the termination of litigation where a defendant tenders to a plaintiff a fair offer to allow judgment").[14]

When Rule 68 was amended in 1946, the committee note made no comment on the change from wording

[14] A survey of state cases also reveals that where typical offer-of-judgment cost-shifting rules have been applied, the offers have been substantial in relation to the claims at issue. See, *e.g.*, *McNally* v. *Rowan*, 92 N.Y.S. 250 (1905) (offer of $1,376.56 to settle $1,576.56 claim; $1,195.58 plus interest awarded to plaintiff; plaintiff awarded costs because offer did not provide for establishment of lien, so plaintiff's recovery was "more favorable"); *Schnute Holtman & Co.* v. *Sweeney*, 136 Ky. 773, 125 S.W. 180 (1910) (offer of $800 plus interest to settle claim of $1,117.46; judgment was $803 without interest); *Yeager* v. *Campion*, 70 Colo. 183, 197 P. 898 (1921) ($10 offer to settle $12.50 claim; judgment was $10); *Terry* v. *Burger*, 6 Ohio App. 2d 53, 216 N.E. 2d 383 (1966) (offer of $50 to settle $100 claim; judgment was $35).

that would make the rule applicable to cases in which the party adverse to the defending party obtained no judgment ("[i]f the adverse party fails to obtain a judgment more favorable than that offered") to the present wording that assumes that such a judgment is obtained before the rule is invoked ("[i]f the judgment finally obtained by the offeree is not more favorable than the offer"). 5 F.R.D. 482, 483 (1946).[15] In view of the way in which, as shown above, similar state provisions operated, the most likely explanation for this omission is that the drafters of the amendment thought that this rewording merely conformed to the sense of the original as generally understood and thus required no comment. The committee similarly failed to explain that the offers to which the rule would apply were reasonable offers that implicitly recognized some merit to the claim and proffered something to settle it; but the committee's observation that one purpose of the rule was "to encourage settlements" is consistent with such an understanding of the rule. 5 F.R.D. at 483. Again, the committee may simply have decided that it was unnecessary to comment on what was generally understood.

2. *Under Our Interpretation, Rule 68 Operates Properly in Tandem with Rule 54(d)*

Because, in our view, Rule 68 applies only in cases in which a party who has rejected a reasonable offer

[15] The sentence in the original rule in which that language appeared was converted into two sentences designed to make it clear that an adverse party could make more than one offer if prior offers were not accepted, so long as the offer preceded a trial, *e.g.*, a second trial after nullification of the judgment in the first or a bifurcated proceeding relating to relief after the determination of liability. 5 F.R.D. at 483.

recovers a judgment less favorable than the offer, costs in a case such as this one will necessarily be determined under Fed. R. Civ. P. 54(d). As we show below, this procedure best serves the purposes of both Rule 54(d) and Rule 68, and is most likely to secure a "just, speedy, and inexpensive determination of every action"—the standard by which, according to Rule 1, Fed. R. Civ. P., the rules are to be construed.

In Rule 54(d), the general provision governing costs in civil proceedings, the drafters of the federal rules combined traditional principles relating to costs in actions at law and actions in equity, making "generally applicable the rule heretofore applied in actions at law, that costs follow the event as a matter of course" but confiding to the courts "a measure of discretion," permitting them to direct otherwise in particular cases. American Bar Ass'n, *Proceedings of the Institute [on Federal Rules] at Washington, D.C. * * * and of the Symposium at New York City* 174 (1938). This provides a firm and reasonable guideline for determining costs, but allows a court to do justice in a particular case when application of the traditional rule for actions at law might be unfair.

To permit token offers, routinely made early in the litigation, to deprive a court of this measure of discretion in cases where the plaintiff has unsuccessfully pursued a nonfrivolous claim would in no way serve the purpose of Rule 68 "to encourage settlements," and it thus would trench on the policies of Rule 1 and Rule 54(d) for no reason. Indeed, giving such an effect to token offers—completely unrelated to the claims in the litigation—would tend to discourage settlements, by inducing defendants to make minimal offers upon

service of the complaint (*e.g.*, $10 with accrued costs) that will almost inevitably be rejected.[16]

Such a construction of the rule would also serve to undermine the policies of Title VII, as the court below noted (J.A. A6-A7), by reducing the incentive for enforcement of this and other antidiscrimination statutes because defendants would be armed with a guaranteed means of penalizing, regardless of the circumstances, "private attorneys general" who file nonfrivolous but ultimately unsuccessful actions.[17] But there is no need for a construction that would bring the rule into conflict with these important statutory policies.

Indeed, requiring Rule 68 offers to be reasonable does not introduce a new element into the rule. The district courts have generally assumed that a requirement that offers be reasonable is implicit in the rule. In *Gay* v. *Waiters and Dairy Lunchmen's Union, Local No. 30, 86 F.R.D. 500, 502*, 22 Fair Empl. Prac. Cas. 1249, 1250 (N.D. Cal. 1980), the court held that

[16] The earlier the offer is made, the cheaper the defendant's insurance against the use of Rule 54(d) would be. Costs accrued would be lowest and costs to be assessed against the losing plaintiff the greatest. And as the author of the only substantial comment on Rule 68 has noted, the offer is "riskless": a token offer is unlikely to induce acceptance; and even if the plaintiff accepts, the resulting judgment would have no issue-preclusion effect on future litigation. Note, *Rule 68: A New "Tool" for Litigation*, 1978 Duke L.J. 889, 891 n.14.

[17] See *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1974). The Court has repeatedly stated that the Title VII policy against discrimination is of the highest national priority and is to a large extent vindicated by "private attorneys general." *See New York Gaslight Club, Inc.* v. *Carey*, No. 79-192 (June 9, 1980), slip op. 8; *Franks* v. *Bowman Transportation Co. Inc.*, 424 U.S. 747, 763 (1976); *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 416; *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974).

under Rule 68 "an award of costs is mandatory, provided the offer was *reasonable and in good faith*" (emphasis supplied). In *Honea* v. *Crescent Ford Truck Sales, Inc.*, 394 F. Supp. 201, 202, 203 (E.D. La. 1975), the court held that the "duty to be reasonable should not be borne by the plaintiff alone" and that a defendant can protect against costs "[i]f a *reasonable* offer is spurned" pursuant to Rule 68 (emphasis supplied). In *Mr. Hanger Inc.* v. *Cut Rate Plastic Hangers*, 63 F.R.D. 607, 610 (E.D.N.Y. 1974), the court considered the plaintiff's contention that the offer was a "sham" and held that the offer was not because it "afforded the plaintiff substantially the relief prayed for in its complaint." (See also state cases discussed at pages 18–20, *supra*.)

Nor does this construction of the rule require an unworkable, subjective test. An offer is unreasonable when a court finds that the offer is so low that it could not have induced a reasonable person to settle at the time when the offer was made. The courts are, of course, thoroughly familiar with the "reasonable person" standard. The standard is an objective one, obviating inquiry into the parties' motives. Inasmuch as the principal purpose of Rule 68 is settlement, the primary gauge for judging reasonableness is the relationship of the offer to the relief that the offeree would be likely to obtain if successful in any of his nonfrivolous claims, taking into account the litigation risks at the time the offer is made.[18]

[18] We do not disagree with the proposition (LCCR Br. 10) that both the state counterparts of Rule 68 and the federal rule itself contemplate "genuine offers," but in our view the ultimate test of genuineness is not the sincerity of the offeror but the reasonableness of the offer.

With respect to our submission that the rule does not apply in cases in which a plaintiff obtains no judgment, it might be contended that this gives the plaintiff who obtains nothing at all an unfair advantage over the plaintiff who obtains a judgment slightly less favorable than a reasonable offer from the adverse party which the plaintiff declined to accept.[19] Unjust results are likely to be few, however. In cases in which the plaintiff obtains nothing, costs will be determined under Rule 54(d), and a defendant who has made a reasonable offer that was rejected by the plaintiff is free to bring that fact to the court's attention, as a matter relevant to the court's exercise of discretion. See *Baldwin Cooke Co.* v. *Keith Clark, Inc.*, 73 F.R.D. 564 (N.D. Ill. 1976). Indeed, where it appears that a plaintiff litigated vexatiously after a fair offer, it may well be an abuse of discretion for a court to direct that the prevailing defendant not be awarded costs.[20] Under the proper application of both Rule 68 and Rule 54(d), then, the usual result will be similar to that aimed for in both suits at law and actions in equity in state courts (see pages 16–20, *supra*), although some injustices may be avoided under the federal rules that would have occurred under traditional state practices

[19] We note that two district courts in recent years have applied Rule 68 in a case in which the plaintiff-offeree obtained no judgment. *Mr. Hangar Inc.* v. *Cut Rate Plastic Hangars*, *supra*; *Dual* v. *Cleland*, 79 F.R.D. 696 (D.D.C. 1978). It appears, however, that the question whether the rule properly applies in such cases was not expressly considered.

[20] If it is determined that the plaintiff's persistence in seeking more than is offered amounts to the pursuit of a claim that has clearly become "frivolous, unreasonable, or groundless," then the award of costs to the defendant could include attorneys' fees. *Christiansburg Garment Co.* v. *EEOC*, *supra*, 434 U.S. at 422.

because of the lack of discretion to withhold the award of costs to a prevailing defendant in most suits at law.

In this case, the principles set out above have been properly applied and have worked no injustice. Respondent had a claim—determined by both courts below to be nonfrivolous (J.A. A5, A12)—which, if successful, was likely to entitle her to reinstatement, backpay amounting to approximately $20,000, and her costs, including attorneys' fees. She reasonably declined petitioner's offer of $450 including attorneys' fees, made at a point in the litigation when she had incurred attorneys' fees well above that amount. To permit petitioner's offer—which as the district court properly concluded (J.A. A12) was no real inducement to settle—to deprive the court of its discretion respecting costs under Rule 54(d) would be to countenance a misuse of Rule 68 that would undermine the purposes of Rule 1, Rule 54(d), Rule 68, and the statute under which the suit was brought.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION UNDER RULE 54(d) BY ORDERING BOTH PARTIES TO BEAR THEIR OWN COSTS

Although it did not raise the issue in the court of appeals, petitioner now challenges (Pet. Br. 24-25) the district court's refusal to exercise its discretion under Rule 54(d) to allow it costs.[21] Where, as here, an issue

[21] Unlike Rule 54(d), Rule 68 mandates only that the offeree pay the costs of the adverse party for the period after an offer meeting the rule's requirements was made. There is no provision in Rule 68 for charging pre-offer costs to the offeree, although the court might rely on Rule 54(d) for authority to impose such additional costs to the offeree. This awkward circumstance provides another reason for construing Rule 68 as applying only in cases in which the offeree has obtained a judgment.

has not been passed upon by the court of appeals, this Court ordinarily declines to consider it. See, *e.g.*, *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 163-164 (1975); *Tacon* v. *Arizona*, 410 U.S. 351, 352 (1973); *Adickes* v. *S. H. Kress and Co.*, 398 U.S. 144, 147 n.2 (1970). We see no reason for the Court to depart from that salutary practice here.

In any event, we do not agree that requiring each party in this case to bear its own costs is an abuse of discretion under Rule 54(d). That rule provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs," and this Court has accordingly held that allowing costs "to the prevailing party is not * * * a rigid rule." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284 (1946). See also *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227 (1964). Appellate review of this discretion is properly limited because the trial judge is in the best position to weigh the equities of the case. See *LeLaurin* v. *First National Bank of San Antonio*, 391 F.2d 687, 692 (5th Cir. 1968).

It is not an abuse of discretion for a court to refuse costs to the prevailing party when "it would be inequitable under all the circumstances * * * to put the burden of costs upon the losing party." *Lichter Foundation, Inc.* v. *Welch*, 269 F.2d 142, 146 (6th Cir. 1959). In the circumstances of this case it was not an abuse of discretion for the district court to have both parties bear the costs of the litigation.[22]

[22] Petitioner's concern (Pet. Br. 25) that such a ruling would encourage plaintiffs to sue, while acting as a disincentive for defendants to defend cases, is unfounded, at least in employment discrimination cases. Plaintiffs in such actions are, like respondent, generally financially hard pressed. Having to pay

Although the court did not make express findings with respect to its costs determination,[23] the court was obviously aware that respondent is an unemployed airline stewardess who pursued nonfrivolous, although unsuccessful, claims; that her rejection of petitioner's offer of judgment was not unreasonable; that she is without significant financial means and must already pay her own litigation expenses to the extent that she is able to do so; that the costs are large; and that it would not be oppressive for petitioner to absorb its own litigation costs. The court's refusal to award petitioner costs in these circumstances was therefore in keeping with the instruction of Rule 1 that the rules be interpreted to promote a just determination of the action.

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their own litigation costs is itself a significant deterrent to bringing or maintaining an action.

[23] See, *e.g.*, *True Temper Corp.* v. *CF&I Steel Corp.*, 601 F.2d 495, 509-510 (10th Cir. 1979); *Walters* v. *Roadway Express, Inc.*, 557 F.2d 521, 526 (5th Cir. 1977); *Compania Peli-neon De Navegacion* v. *Texas Petroleum Co.*, 540 F.2d 53, 56-57 (2d Cir. 1976).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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